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IN THE
TEXAS COURT OF CRIMINAL APPEALS
AT AUSTIN

SANDRA JEAN MELGAR,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

ON DISCRETIONARY REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH
SUPREME JUDICIAL DISTRICT OF TEXAS
AT HOUSTON
CASE NUMBER 14-17-00932-CR

Appeal in Cause Number 1435566
in the 178th District Court
of Harris County, Texas

REPLY BRIEF FOR APPELLANT ON PETITION FOR DISCRETIONARY REVIEW

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NAMES OF ALL PARTIES

JUDGE:	Honorable Kelli Johnson 178th District Court Harris County, Texas
PROSECUTORS:	Colleen Barnett Clint Morgan (Appeal) Harris County District Attorney's Office 1201 Franklin, Suite 700 Houston, Texas 77002
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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

RULES

OTHER AUTHORITIES

NO. PD-0243-20

IN THE
TEXAS COURT OF CRIMINAL APPEALS

SANDRA JEAN MELGAR,
Appellant

VS.

THE STATE OF TEXAS

TO THE HONORABLE JUDGES OF THE TEXAS COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

The appellant, Sandra Jean Melgar, by and through her counsel of record, respectfully submits this Reply Brief, pursuant to Tex. R. App. P. 38.3. On November 4, 2020, the appellant timely filed her brief. On December 29, 2020, the State filed its brief in response. The appellant now timely files its Reply Brief.

Appellant relies fully on arguments previously advanced in its opening brief. Appellant addresses herein multiple factual assertions advanced by the prosecution which are either (a) not supported by the trial record, or (b) unfairly characterize it, by omitting critical evidence which, in fairness, must be considered in determining whether the prosecution discharged its burden of proof.

The shortcomings of the prosecution's legal arguments will also be addressed. The State has conveniently sidestepped discussing crucial components of a legal-sufficiency review adverse to its case by failing to acknowledge (and analyze)

significant case law authority cited by appellant.

REPLY TO STATE'S ARGUMENT REGARDING THE LEGAL SUFFICIENCY OF THE EVIDENCE

A. Introduction and overview of the State's brief

Faced with the daunting task of explaining how any rational trier of fact could have found beyond a reasonable doubt that Sandy Melgar was guilty, the State perfunctorily dispenses with an in-depth analysis of the evidence in its brief. Instead, it chooses to isolate certain facts, while omitting others, ultimately presenting a highly selective and truncated overview of the trial evidence, rendering it both superficial and incomplete. It then declares, based on *its* portrayal of the trial record, that the evidence was legally sufficient. A fair and objective consideration of the evidence, however, even when reviewed in the light most favorable to the jury's verdict, leads, ineluctably, to the conclusion that no rational trier of fact could have found the State proved beyond a reasonable doubt that Sandy murdered her husband, Jaime.

The State speciously asserts that "[t]o write an opinion in which the appellant wins, this Court will have to give weight to evidence the jury was not obliged to believe." (State's Brief at 9). It states that the judgment must be affirmed (or this case dismissed as improvidently granted), "[u]nless this Court wishes to overhaul the system of sufficiency review in Texas..." *Id.* None of this hyperbole is remotely true. Rather, the State inaccurately characterizes the legal-sufficiency grounds for review by

basically recasting them in terms of little more than a "swearing match" between the prosecution's version of events and that of the defense; it claims that in light of the jury's verdict, the evidence *must* be legally sufficient because the jury's credibility determinations are unassailable on appeal.

This is simply incorrect. "[A]pplication of the beyond-a-reasonable-doubt standard to the evidence is *not irretrievably committed to jury discretion." Jackson v. Virginia,* 443 U.S. 307, 317, fn 10 1979)(Emphasis added). While the evidence must be viewed in the light most favorable to the verdict, this only ***begins*** *Jackson's* legal-sufficiency analysis; the "standard **still requires** the reviewing court to determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *Brooks v. State,* 323 S.W.3d 893, 902 (Tex. Crim. App. 2010) (Emphasis added). *Jackson's second* prong "essentially incorporates a factual-sufficiency review." *Brooks,* at 902.[1] Deference, which ordinarily must be paid to credibility determinations by the jury, is "*not without limits. A jury's decision to reject witness testimony must be rational in light of the totality of the record, and any underlying inferences used to reject that testimony must be reasonable based upon the cumulative force of all of the evidence*." *Braughton v. State,* 569 S.W.3d 592, 611 (Tex. Crim. App. 2018) (Emphasis added).

[1]Throughout its brief, the State ignores the distinctly *separate* "**rationality**" component essential to a legal sufficiency review on appeal.

In addition, by characterizing the legal-sufficiency inquiry as essentially a fight over witness credibility, the State effectively (and improperly) attempts to shift the burden of proof *to the defense* to establish facts or fill in the evidentiary gap, which the prosecution *alone* bears the burden of meeting.[2] For example, the State asserts that "there is no hard proof of anyone else being there" [in the residence at the time of the murder.] (State's Brief at 9). But the defense had no burden to adduce "hard" proof of anything, including having to prove that another person or persons were present in the house (although the evidence certainly supports that conclusion.) To suggest otherwise unconstitutionally shifts the burden of proof to the accused. *Sandstrom v. Montana,* 442 U.S. 510 (1979); *Tehan v. United States ex rel Shott,* 382 U.S. 406, 415 (1966)(The accusatorial system of justice requires "the government in its contest with the individual to ***shoulder the entire load***." (Emphasis added)).

Whether the jury believed or disbelieved Sandy, or witnesses favorable to her, those credibility determinations–even if adverse to the defense–did ***not*** relieve the prosecution of its ***exclusive*** burden of proving each constituent element of the offense of murder beyond a reasonable doubt; nor do purportedly adverse credibility determinations somehow "morph" or transform themselves into affirmative evidence of guilt. *Gold v. State,* 736 S.W.2d 685, 689 (Tex. Crim. App. 1987). Neither the

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[2]Which is precisely what the prosecutor did in final argument: "Think about this: If Sandra Melgar is really innocent and didn't do it, *what efforts did they* (defense) *make to try and find out who did*?" (RR 13–151) (Emphasis added).

panel opinion below nor the State on appeal ever fully comes to grip with this reality.

Of paramount importance, as demonstrated *infra,* the State *never* addresses appellant's argument that many of the inferences it asks this Court to accept as having been drawn by the jury in returning a guilty verdict, are *not* based on evidence presented at trial. Rather, conclusions it (and the panel) contend the jury legitimately reached were, in fact, founded "on mere speculation or factually unsupported inferences." *See Hooper v. State,* 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). Amazingly, but tellingly, the State does not deign to cite, much less explain, why the holding and rationale of *Hooper* and its progeny is not fatal to its legal argument. It never accepts that in a legal-sufficiency review, "conclusions reached by speculation" are "not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Id.* at 16.

B. The State's analysis of the record evidence excludes consideration of countervailing facts adverse to its theory of the case and fails to recognize the "highly individualized" nature of a legal-sufficiency review on appeal

Although the evidence on appeal is reviewed in the light most favorable to the verdict, evidence adverse to the prosecution and contrary to a rational finding of fact may not simply be "disregarded" or ignored as the State urges. The State's suggestion that "[a] proper sufficiency review here begins with disregarding evidence the jury

could have disregarded based on credibility", (State's Brief at 14)[3] is antithetical to the constitutional standard which actually mandates that ***all*** the evidence must be reviewed on appeal. *United States v. Giraldi,* 86 F.3d 1368, 1371 (5th Cir. 1996). Because the State misapprehends the correct legal standard, little consideration is given to evidence *adduced by the defense,* both in its cross-examination of prosecution witnesses and in its case-in-chief. While the State has chosen to turn a blind eye to *all* the evidence supported by the record, an appellate court *must* "consider the ***countervailing evidence*** as well as the evidence that supports the verdict." *Brooks v. State, supra,* at 899 (Emphasis added). *See also Evans-Smith v. Taylor,* 19 F.3d 899, 904 (4th Cir. 1994):

> It is essential to remember that *Jackson* (*v. Virginia*) requires that we review all the evidence and then determine whether a rational trier of fact could have found guilt beyond a reasonable doubt....***Favoring the prosecution with all inferences does not mean that we must ignore evidence that is in the record, but which they ignore.*** (Emphasis added).

Only by considering all of the evidence can an appellate court ensure that the jury's factual determinations, including those necessarily involving witness credibility, are rational. Finally, a review of legal sufficiency is a case specific *"highly individualized inquiry*." *Nisbett v. State,* 552 S.W.3d 244, 263 (Tex. Crim. App. 2018) (Emphasis added).

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[3]No authority in support of this extra-constitutional proposition is cited.

C. The acceptance by the panel of the prosecution's theories concerning how Sandy *could* have tied herself up and locked herself in the bathroom closet, was not based on record facts but rather founded upon speculation and the possible meaning of evidence; and, in any event, a jury's assumed disbelief of certain witness testimony does not establish substantive proof to the contrary

Due to word limitations, appellant adopts by reference what has previously been set out regarding the manner in which Sandy was found tightly bound by her arms behind her back and locked in the master bathroom closet with the chair wedged underneath the exterior doorknob. (Brief for Appellant at 4-6; 80-84). Suffice it to say that the State and the panel have mischaracterized what the record actually shows. Sandy was *not* tied *exclusively* at the wrists, but rather, from her wrists along her forearms to just below her elbows. (RR 9–161-164, 208-209). Moreover, no mention was made of the **unassailable physical evidence of red marks and bruises covering several inches** along Sandy's forearms, just above the wrist, and testimony that those marks were "from the ties she had on". (RR 9–204-206; 11–178-179; DX 2643, 1959, 1960; SX 528-531).[4] This substantiated that the ties were *not* restricted to her wrists, contrary to the prosecutor's "demonstration" for the jury which was based on erroneous assumptions unsupported by the record. The State never offered any evidence to counter or dispute this, nor questioned it on appeal. "[A] jury is not permitted to disregard undisputed objective facts that can support only one logical

[4]All of the photographs of Sandy's arms were taken at the scene by CSU Investigator Carpenter.

inference." *Braughton, supra,* at 611.

The State *now*, on appeal, even questions whether Sandy was *tied-up at all* when found by members of the *victim's* family. (State's Brief at 22). In attempting to cover all of its bases, it even asks, *assuming* she was tied-up, "How well-tied was the appellant when she was found?" (State's Brief at 16). Any fair reading of the record demonstrates the State did *not* establish that Sandy was *anything but* tied up tightly when found.

With respect to the chair, the State either inaccurately characterizes or minimizes the evidence, or simply avoids discussing it all together. It *now* questions whether Sandy was *even* in the closet when family members arrived for dinner, arguing that it depended "on the appellant's statements or the testimony of family members" and "some easily fabricated evidence – a torn scarf and pants that had been defecated in." *Id.* (At least the State finally acknowledged (the panel did not) that Sandy had defecated on herself–although in her underwear, not pants.)

As for the scarf, there was *no* evidence that it had been ***torn****;* rather it was found on the master bathroom floor having been ***cut*** from Sandy by Herman and Maria because it was tied so tightly it could not be untied by hand. (RR 9–162, 184).

Is it *now* the State's *hypothesis* that maybe Sandy, Herman or Maria cut the scarf, which was never used to restrain her, and then left it on the bathroom floor to be found by law enforcement officers? Why would Herman want his own brother slaughtered

or be willing to cover it up? These "theories" can be added to the bevy of theories and suppositions already advanced by the State to serve as substitutes for evidence.

Thoroughly detailed in appellant's brief (Brief for Appellant at 4-6, 80-84), the State's rendition of the "experiment"[5] conducted with the sham *omits* critical and undisputed evidence regarding the positioning of both the chair and the sham. (*Id.*; RR 9–160-161, 182-183). In clear violation of *Hooper, supra*, the prosecution "proposed" and the panel readily accepted speculation that the tear on the sham *could* have been torn while the chair was supposedly moved.[6] (593 S.W.3d at 918). State's witness Lieutenant McConnell, however, conceded the "demo" was *merely a theory;* he had no evidence that what his "demo" depicted *actually* occurred in this case. (RR 6–222-223). He further agreed that merely because the tear lined up with the door frame **(after he placed the sham in his chosen position)** "*did not establish, at all, that, the sham was used in the way* ( ) *demonstrated in this theory...*" *Id.* at 225-226 (Emphasis added).

The panel opined, notwithstanding Herman and Maria's testimony about the chair and sham, that the jury was free to reject it "***and draw the opposite inference***." (593 S.W.3d at 921) (Emphasis added). No authority was cited in support of this

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[5]The experiment was not based on the actual facts of this case.

[6] Not only did the panel improperly speculate about the possible meaning of evidence in this regard, it also "bootstrapped" its conclusion by erroneously deciding "[t]here was evidence of *staging* in the torn pillow sham ..." (593 S.W.3d at 921) (Emphasis added).

proposition. *Id.*[7] In fact, the law is to the contrary. "Disbelief of certain testimony, however, cannot stand in as proof of the opposite of that testimony." *Tillman v. State,* 426 S.W.3d 836, 840 (Tex. App.–Houston [1st Dist] 2014, pet. ref'd; *Metcalf v. State,* 597 S.W.3d 847, 860 (Tex. Crim. App. 2020); (Brief for Appellant at 95-96).[8]

The State cannot legitimately argue that in a legal-sufficiency review the *contrary* is proven when it offered no evidence whatsoever on the subject. Simply stated, there is *no* evidence demonstrating Sandy was *not* tied–up as described by the only eyewitnesses who saw her in that condition, as corroborated by the undisputed physical evidence of bruising on her lower arms; nor is there any evidence which contradicts or disputes Herman and Maria's testimony regarding the fact that the back legs of the chair were *directly* on the tile floor and *not* on a sham.

D. The State relies on Sandy's "mere presence" and the fact that she wasn't murdered, herself, in an effort to prove her guilt

Although Sandy was present at the residence when Jaime was murdered, the State could not link her to the actual crime scene itself, much less to commission of the offense. There was no physical evidence, including DNA or other forensic proof, connecting her to Jaime's brutal murder. In fact, the physical evidence strongly

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[7]It was the State who proposed that the sham was used (and torn in the process); therefore, as the proponent, it had both the burdens of production and persuasion to establish the same.

[8]For its part, the State claims that the panel "did not use disbelief as substantive proof of a contrary fact", but does not offer any analysis or argument which addresses the authorities cited by appellant. (State's Brief at 34).

suggested she could not have killed him. Because of the *absence* of evidence which proved or even tended to prove Sandy committed the offense, the prosecution promoted a theory at trial that she *must* have been the killer, in view of the fact that there was "no forced entry" into the residence, "no property was missing", and investigators surmised that the scene *might* have been staged. The State also contended that some of the statements Sandy made to law enforcement were purportedly false, or, at the very least, "inconsistent", and therefore, the jury could have reasonably rejected "her entire defense" and found her guilty, based on that alone. The fact that Sandy was found alive at the residence[9] and was not, *herself*, slaughtered by Jaime's killer(s), was the lynchpin of the prosecution's case against her, notwithstanding the lack of motive and uncontroverted evidence that Jaime was the love of her life.[10]

(1) Mere presence in the residence at the time of the murder

The State argues that law enforcement officers arriving at the scene "confirm(ed) there was no one else there." (State's Brief at 11). (The relevant inquiry, of course, is whether the State proved no one else was there *at the time of the murder.*) The State "cannot think of a circumstance that creates a stronger inference of guilt than a

[9]The panel concluded because Sandy was at the residence at the time of Jaime's murder that she "at least had the opportunity to commit the murder." (593 S.W.3d at 920).

[10]The State does not argue that it proved at trial Sandy had a motive to kill Jaime.

defendant and victim being alone at the time of the murder." (State's Brief at 21).[11] It argues there was a "substantial basis" for the panel's conclusion that "no one else was in the house at the time of the murder" which "stemmed from evidence that there was no sign of forced entry, and the appellant's statement that when she and Jaime got home the prior night they shut the garage door." (593 S.W.3d at 921; State's Brief at 18).

(2) Misplaced reliance on no signs of "forced entry" into the residence

The argument there were no signs of a "forced entry" is nothing short of a canard in light of the irrefutable proof that ingress to and egress from the residence could easily have occurred *through an open garage door and unlockable interior door.*[12] The panel even surmised that the open garage door "was *consistent with* the appellant committing the murder and then opening the garage door so relatives–who said they had been invited to dinner that afternoon–would arrive and 'rescue' her from

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[11]The State argues "[i]f two people walk in but only one walks out, the inference of guilt is not just logical, it's compelling." *Id.* To support this proposition, it cites *Skinner v. State,* 956 S.W.2d 532, 537 (Tex. Crim. App. 1997). But *Skinner* hardly advances the State's argument. Skinner lived with all three victims and was found hiding in a closet wearing blood-stained socks and blue-jeans; the blood matched two of his victims. Notwithstanding the fact that Skinner's bloody hand-print was left on the door of the third victim's bedroom (who shared the room with one of the other victims), Skinner argued the evidence was legally insufficient to prove he murdered the third victim. *Id.* Skinner made a series of inconsistent statements about the events–including claims he had been shot and stabbed, which were not true. *Id.* at 535. He also threatened to kill a witness who attempted to contact police. *Id.*

[12]To date, neither the State nor panel has addressed the existence of the unlockable interior door at the back of the garage which led into the residence.

the closet." (593 S.W.3d at 921; State's Brief at 19).[13] And yet, in the same breath, the panel acknowledged that "*the evidence did not establish when that door was opened, or who opened it.*" *Id.* (Emphasis added).

Whether something is "consistent with" a proposition does not prove it, and certainly not beyond a reasonable doubt. This is yet another glaring example of improperly hypothesizing about the possible "meaning" of evidence which impermissibly (and dangerously) supplies a "bridge in the analytical gap", in the prosecution's evidence. *Ferguson v. State,* 506 S.W.3d 113, 121 (Tex. App. Texarkana 2016, no pet.) As for Sandy's purported statement that once home "they shut the garage door", both the State and the panel mischaracterized this critical evidence. Sandy did ***not*** tell detectives "they shut the garage door" after arriving home. She was very clear and consistent: she assumed Jaime closed the garage door but did *not* know whether or not he did because she went into the house first. (RR 8–57-58, 62). *This fact was confirmed by detective Dousay. Id.*

(3) The erroneous supposition of "no stolen property"

The State, as did the panel, relies on the proposition that evidence proving

[13]Grasping at straws, the State now argues that "the only evidence the garage door was open at any relevant time was testimony from the appellant's family members–the crime scene photos showed an open garage, but the jury did not have to believe the family members (that) the garage door was open when they got there." (State's Brief at 28). Wow. Is the State now suggesting the victim's family lied about the open garage door? How else was Herman able to enter the house? What about the testimony of neighbor Scott Lacey who told investigators he observed the garage door open at approximately 7:15 a.m., long before the arrival of Herman and his family? (RR 10–236; 11–7). Even the panel acknowledged that the garage door was found open.

nothing was stolen in a home invasion may suggest that there was no home invasion at all. In support of this premise, both cite *Temple v. State,* 390 S.W.3d 341 (Tex. Crim. App. 2013). But the facts of *Temple* are readily and easily distinguishable on a number of fronts. In *Temple,* there *were* signs of a "breaking" into the residence, but the location of the broken glass was inconsistent with the door being closed at the time the glass was broken; the fact that a piece of furniture next to the broken door was undamaged was at odds with the defense's theory that the glass broke by the force of the door hitting it. *Id.* at 361. Temple admitted to investigators that the *"burglars didn't take one single thing that belonged to [him]*"; an insurance claim was later filed for several pieces of missing jewelry which law enforcement officers were unaware of until observing the report on television. *Id.* at 348.

Compare this to the instant case. The panel's assertion that "no other valuables were missing" from the residence (593 S.W.3d at 920), is belied by the record.[14] No money was found in Sandy's purse, wallet, or in Jaime's wallet, found strewn across the bed, although the evidence showed that the Melgars habitually used cash for small purchases. (RR 12–75). A television (with its antenna left behind), electronics,

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[14]As previously explained, a backpack was found in the garage which contained a number of items stolen from the house; third-party DNA *foreign* to the Melgars, including another unidentified male's blood, was detected on some of these items. (Brief for Appellant at 91-92). The panel concluded that "**[*e*]*specially considering that no other valuables were missing from the home*** the jury was free to believe that appellant had stuffed the backpack herself, and then planted it in the garage for investigators to discover it." (593 S.W.3d at 921) (Emphasis added). This constituted the very essence of inappropriate "theorizing or guessing as to the meaning of evidence." *Cary v. State,* 507 S.W.3d 761, 766 (Tex. Crim. App. 2016).

jewelry, and prescriptions, including opioids, were missing and ***were*** reported stolen to law enforcement. (RR 12–61, 63-65, 83, 147-148, DX8). And unlike *Temple,* investigators herein conceded they *did not know* what was missing and ***were not saying that nothing had been stolen***. (RR 6–115-116, 121).

Although the State very much wants to rely on the negative evidentiary inference arising from the *absence* of stolen property, it doesn't want to assume responsibility, as the proponent of the proposition, of proving it. It claims that "proving this particular negative would have been impossible", and that the jury was free to disbelieve "appellant and her daughter." (State's Brief at 29-30). But how would information that property was stolen in a home invasion ever be brought to the attention of law enforcement if not through the residents of the household that had been invaded?[15]

4. Opinions regarding possible "staging" based, in part, on faulty premises

Much of the testimony about possible "staging" was based on the erroneous beliefs discussed above–the purported lack of forced entry and/or no missing property. This colored the entire investigation going forward. Incredibly, CSU Carpenter was shown to be *unaware* that the interior door did not lock so it wasn't documented in his offense report. (RR 5–43-44; 6–112). The opinions of Deputy Rossi about possible

[15]The crime scene investigation corroborated and substantiated the fact that property had been taken–the antenna to the television left behind, and the space in the living room shelving where electronics used to fit, with an electronic cable extending from that space. (Brief for Appellant at 26-30).

"staging" were based significantly on erroneous assumptions and incomplete information about the absence of "forced entry" and "lack of signs of disturbance." (RR 9–56-57). She never went to the crime scene, nor spoke with any investigators; she relied solely on Carpenter's reports and photographs which only documented that no glass had been broken and no doors had been "kicked" open. *Id.*

The panel's conclusion that dresser drawers appeared to be undisturbed is contradicted, in large part, by other evidence showing drawers were fully opened with contents strewn on the floor, bed and bathroom counter. (Brief for Appellant at 92). There was ample evidence that items had been rummaged and picked through. (RR 5–30). Investigators suggested the *possibility* of staging because "[*m*]*ost* times in a *typical*" home invasion the house is a wreck. (RR 5–107-108) (Emphasis added). But they also admitted that home invasions do *not all look alike,* and, in fact, are different; and acknowledged that other investigators might well come to a different conclusion about whether a scene may have been "staged". (RR 6–107-108; 9–80-81; 11–100-101). Appellant continues to maintain the proffered evidence of "staging" on *this record* is simply "too speculative or conclusory" to be considered particularly probative for purposes of a legal-sufficiency review. (Brief of Appellant at 94).

E. Scene evidence, the manner in which Jaime was assaulted and brutally murdered, and the absence of injuries to Sandy's hands, point to a third person or persons as the killer(s) or, at the least, raise a reasonable doubt as to Sandy as the killer; the State's argument that "the killer was a weak person" (and, therefore, must be Sandy) is based on the rankest of speculation and constitutes a revisionist attempt to recast on appeal what the evidence actually showed at trial

The State misapprehends appellants' argument regarding the *absence* of blood found in the master bathroom. Jaime's blood was found *only* in the master bedroom, master bedroom closet, and on a knife in the Jacuzzi in the master bathroom. (RR 12–227-230). According to the panel, "[t]he prosecution ***proposed*** that no blood was found elsewhere because appellant killed Jaime in the master bedroom ***and then washed herself off in the master bathroom.***" (593 S.W.3d at 917) (Emphasis added). However, the State's "proposal" was eviscerated in light of indisputable forensic evidence from the State's own expert which established that none of Jaime's blood was detected on any surface in the master bathroom, including the sinks, shower, and Jacuzzi. (RR 12–203-205).[16] Of greater import, application of blood reagents to the various surfaces would have detected the presence of smear or wipe patterns had there been any effort to clean the sinks (which were *dirty),* but there was no such indication. (RR 5–149-150).

[16]While absence of blood in the bathroom may not be "dispositive" of Sandy's innocence (593 S.W.3d at 923), it certainly refutes a key prosecution premise–accepted by the panel–that Sandy must have washed herself in the bathroom and undermines the rationality of the verdict.

There was no evidence of "blood transfer" or "cast-off" pattern from *removing* bloody clothes or gloves ***anywhere in the house***. (Nor were any bloody clothes or gloves found.) (RR 5–155-156; 9–113-117).[17] This is a *consequential* fact that the State cannot simply disregard, especially since it dispels an important point of its narrative and establishes there is **no evidence** showing Sandy disposed of or attempted to dispose of any "incriminating" evidence.[18]

The prosecution argued if a third person committed the murder they would have left blood traces, yet none were found. (593 S.W.3d at 917, 919). Although this "theory" or "proposal" was adopted by the panel, it was debunked by the State's own CSU investigator and Deputy Rossi who **could not exclude** the possibility that more than one intruder had fled the premises ***without leaving blood traces behind***, in part, because there was no blood pooling in the closet and most of the blood was found *underneath* Jaime**.** (RR 9–108-109, 101-102).

As for the extent of injuries inflicted on Jaime, the State (and the panel) *omitted* any reference to the extensive *blunt force* trauma he sustained. (State's Brief at 9).

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[17]The appellant has argued that it is "more likely that the killer(s) left without leaving blood trace evidence than it is that [the appellant] 'washed up' in the residence." (Brief for Appellant at 85). Deputy Rossi testified that someone with a level of sophistication could take gloves off and "turn them into each other" and put them in their pocket (thereby leaving the crime scene without a trace). (RR 5–155-156; 9–115).

[18]The State argues "[i]n the dining room was a mop and bucket; Martinez said the bucket smelled of bleach." (State's Brief at 12). The State is deliberately misleading this Court by raising the specter of nefarious or suspicious conduct on Sandy's part. It intentionally omits testimony from its own law enforcement witnesses that ***there was no evidence the mop and bucket (which were in plain sight) had been used to eradicate evidence in this case***. (RR 9–93).

Jaime was *struck*, cut or stabbed "over 50 times." (RR 8–214) (Emphasis added). The medical examiner testified Jaime sustained "a lot of injuries, *blunt injuries that I see in people that are* ***assaulted and beaten***." (RR 8–201) (Emphasis added).

The attack was "particularly violent"; there were bruises on his ***back***, hands, knees, and hips, and *some of the injuries were consistent with being hit with a fist. Id.* Blunt force trauma over the bridge of his nose was *inconsistent* with the use of a knife and subcutaneous hemorrhages on the back of his right ankle were consistent with him being *kicked.* (RR 8–203, 215-216). The medical examiner could not exclude the possibility that there was more than one assailant; particular injuries suggested the use of another weapon besides a knife, and the use of more than one knife was possible because "the wounds of the head have a different appearance than the wounds of the torso." (RR 8–197-199; 180-186, 195; SX677 at 2). (The panel avoided considering this evidence as well.)

Importantly, Sandy had ***no injuries to her hands, including bruising, and all of her nails were intact***–all inconsistent with her having inflicted repeated acts of blunt force trauma during a violent beating.[19] The *absence* of any injuries to Sandy's hands was omitted from the State's discussion of the facts as well, because it severely damages the State's theory of the case and undercuts the rationality of the verdict.

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[19]Carpenter testified that bruising could occur on a person's index finger by repeatedly stabbing someone causing their index finger to contact the hilt of the knife. (RR 5–177, 180-181). He saw *no such bruising* on Sandy after examining her hands. *Id.*

The panel concluded it was "physically *possible*" for Sandy to have murdered Jaime because he was "short and thin" and because she *may* have outweighed him by fifteen pounds, and "was capable of overpowering Jaime in a physical attack." (593 S.W.3d at 921; Brief for Appellant at 86, fn 99). But there is *nothing* in the record which remotely addresses whether Jaime was strong or weak for his size, or was agile and capable of defending himself; moreover, there was **zero** evidence that Sandy had the ability, skill, training, much less the inclination, to engage in such a brutal crime even if all of her serious physical and medical issues are somehow "dismissed". The panel's conclusions in this regard are entirely and grossly speculative. The more apt inquiry is *not* whether it was physically *possible* for Sandy to have overpowered Jaime and butchered him, but whether the evidence reasonably supports a conclusion that she *actually did.*

According to the panel, the jury could have reasonably concluded that bruises on Sandy's upper arms (biceps) "*were caused by Jaime as he resisted her brutal stabbing*." (593 S.W.3d at 920) (Emphasis added). The panel is surely in error and "supplying a 'bridge to the analytical gap' in the prosecution's case by engaging in the rankest speculation about the possible meaning of evidence." (Brief for Appellant at 87). ***No forensic evidence was adduced which supported this conclusion***. The State acknowledges there "was no testimony stating the bruises came from the fight, *but of course the only other witness to the murder was dead so there couldn't be.*" (State's

Brief at 26) (Emphasis added). But that doesn't explain why the prosecutor avoided asking the medical examiner about these bruises, unless her anticipated testimony was adverse to the State, or she could not express an opinion about the matter. Either way, the jury could not have "reasonably concluded" that Jaime caused the bruising.

The State also argues that defense counsel could have questioned the medical examiner (about a subject that was never broached in her direct examination) but did not do so. Although true, defense counsel bore no burden whatsoever to prove anything in this case, including how or when the bruising to Sandy's biceps occurred. But the State did.

In its brief, the State trumpets a theory hatched, at least in part, for the first time at trial by the prosecutor in *final argument*: that there was a necessary correlation between the *depth* of Jaime's stab wounds and the relative brawn (or lack thereof) of the killer, i.e., since his wounds only penetrated three inches, the killer had to be Sandy because "*[t]hat's not something that somebody is, like tall and strong, they're going–they're going all the way to the hilt. Hers were not that deep. That fits her height, fits with her weight.*" (RR 13–166-167). (Emphasis added).[20] On appeal, the State continues this charade by characterizing Jaime's stab wounds as "weak knife attacks" and surmises that "[b]oth the nature of Jaime's injuries as well as the fact that

[20]That statement was outside the record and unsupported by it; therefore, it was improper for the prosecutor "to invite the jury to speculate" about such matters. *Baines v. State,* 401 S.W.3d 104, 107 (Tex. App.-Houston [14th] 2011).

he did not use a readily available firearm are consistent with the attacker *being somewhat feeble*." (State's Brief at 25) (Emphasis added).

This is complete nonsense. That the prosecutor never asked Dr. Pinerri if there was any forensic support for this supposition is quite telling. In fact, the forensic literature roundly ***rejects*** such a ludicrously inaccurate proposition:

> ***Once the tip* (of a knife) *has perforated the skin, the rest of the blade will slide into the body with ease. As long as it does not contact bone,*** *a knife can readily pass through organs with very little force.* ***Thus, even if a knife blade is driven its complete length into the body, this does not necessarily mean that the stab wound was inflicted with great force.***

Forensic Pathology, 2nd Ed., Vincent J. DiMaio & Dominick DiMaio 2001, p. 187 (Emphasis added). The jury was not authorized to draw any inferences or reach any adverse conclusions against Sandy as to any of this because the prosecutor's argument was based on sheer speculation and not evidence. *Hooper, supra,* at 16.

On appeal, the State posits that because Jaime (1) received all of the injuries to the front of his body while in the bedroom closet[21] and had no injuries to his back, "showing that he was facing his attacker for the entire assault", (2) "never reached for the gun" that later was found under clothing on the back shelf of the closet, and (3) "had defensive wounds on the outside of his arms and hands–as though he was trying

[21] The State omits any reference to another curious aspect of this case: the handle of a safe in the bedroom closet (the same closet where the "weak" and "somewhat feeble" person murdered Jaime) appeared to have a *bloody fingerprint* on it, and yet, CSU investigators and detectives never made any effort to swab the handle for possible DNA or fingerprints. (RR 10–120-121).

to block blows–but he had no one else's DNA under his fingernails, showing he did not scratch his attacker trying to fight back", it necessarily follows that "the murderer was someone Jaime did not wish to shoot. Someone *weak*, who, Jaime thought he could fend off with his hands. *Someone like* the appellant." (State's Brief at 25, fn 6.) (Emphasis added). This argument is irrefutably predicated on a foundation of speculation and false premises.

The State once again mischaracterizes the evidence. It *omits* that in addition to the sharp force injuries, Jaime sustained "a lot, probably more than 20" ***blunt*** force injuries as well, some to his ***back***. The State fails to mention Jaime had a *skull fracture* as well as blunt force trauma injuries to the *top* of his head; he also sustained orbital fractures to the bones over both eyes, likely caused by "a *different* mechanism of injury" and that *each* respective injury was caused by a *separate* use of a weapon, thrust, or blow. (Emphasis added). (RR 8–198-200). The State is stunningly silent as to the fact that Jaime was *beaten* by his assailants. (RR 8–221). And, the State's theory–that all of Jaime's injuries must have been inflicted in the closet–conveniently ignores Dr. Pinerri's testimony that Jaime could have been hit on the head and then *later* stabbed to death; she noted that "[i]t's going to take some time" to cause Jaime's injuries because they were not "immediately incapacitating." (RR 8–204). No evidence established that all of the multiple *blunt* force injuries occurred in the closet.

F. "Inconsistent statements" and "falsehoods" purportedly made by Sandy are not fairly supported by the record, and, in any event, do not constitute substantive evidence of the commission of the crime of murder. Reliance on the same as affirmative evidence of guilt unconstitutionally lowered the State's burden of proof

The panel concluded "inconsistencies" in Sandy's statements indicated guilt and allowed the jury "to reasonably determine ( ) that the entire defense was not credible." (593 S.W.3d at 922). For its part, the State argues that "lies of (the appellant) told to the police on subjects related to her defense naturally might cause the jury to disbelieve the core of her defense. Deferring to credibility determinations like that is the core of sufficiency review." (State's Brief at 31-32).

While many of Sandy's statements have been mischaracterized, there is a critical distinction between reliance on statements for purposes of making a *credibility* determination and using an adverse credibility determination as *substantive* evidence, especially *substantive evidence of guilt*. While the jury did not have to believe Sandy, or for that matter her defense, whether it did so or not did not relieve the State of its burden of proving her guilt beyond a reasonable doubt. The State pays no more than "lip service" to this fact and never bothers to cite, much less analyze, any of the appellant's cited authorities. But neither did the panel.

As Professors Dix and Schmolesky have instructed, with respect to determinations of credibility, "such disbelief does ***not*** become affirmative evidence of the contrary to meet the State's burden of proof." Tex. Prac. 43A, Dix and

Schmolesky, § 51.40 at pg. 737. *See Gold, supra,* at 689 ("[F]actfinder may not find facts necessary to establishing an element of a criminal offense purely on the basis of its disbelief of the accused's contrary assertions"); *Wright v. State,* 603 S.W.2d 838, 840 (Tex. Crim. App. 1979)(evidence not rendered sufficient by factfinder's disbelief of appellant's statements); *Metcalf v. State,* 597 S.W.2d 847, 860 (Tex. Crim. App. 2020) (Disbelief of defendant's statement does not allow jury to reasonably infer the opposite.) "Rather, the State has the burden of going forward with evidence to show, and of persuading the factfinder beyond a reasonable doubt of every element of the offense", *Gold, supra,* at 689, in order to "comply with due process and due course of law." *Johnson v. State,* 770 S.W.2d 72, 74 (Tex. Crim. App. 1974).

Both the panel and the State seize upon unreliable and speculative law enforcement demeanor testimony that surmised Sandy *may have been* acting, "appeared" to cry "without tears", and was evasive in answering questions.[22] (593 S.W. 3d 916, 921-922); (Brief for State at 19). But then assiduously avoid mentioning the testimony of first responder Paramedic Roberts who described Sandy as "crying

[22]The panel asserts that Sandy "was slow to respond to the investigators' questions, suggesting that she was withholding information and carefully choosing her words." (593 S.W.3d at 923). It misplaces reliance, again, on the facts of *Temple* which are simply inapposite to the facts herein. Any fair examination of Sandy's interrogation (SX673) belies the panel's characterization. Beyond reeking of improper speculation, it also unfairly fails to take into consideration the fact that Sandy had just lost her husband, had herself been traumatized, suffered from lupus, and complained about her head hurting during the interrogation. She agreed to speak to investigators, was cooperative, and never refused to answer any of their questions. Answers that Sandy gave, now being questioned or "second guessed", were often never followed up, nor were requests for clarification made.

hysterically", "inconsolable, "screaming", and "in shock"; she believed **Sandy appeared genuine** (as did the Melgar family). (RR6–42, 69-71, 52). Deference to a jury's resolution of conflicts in the evidence is due "provided that the resolution is *rational*." *Jackson, supra,* at 326. (Emphasis added).

The State's characterization of statements Sandy made (or attributed to her) as "inconsistent" regarding her seizure disorder, the barking dogs, and the fact she did not hear sounds of any struggle or attack, is a gross mischaracterization of her responses, particularly when evaluated in the context of the entire interview and other evidence, including physical evidence. They are reviewed in exhaustive (and accurate) detail in appellant's brief. (Brief for Appellant at 44-51).

The State cites *Guevara v. State,* 152 S.W.3d 45 (Tex. Crim. App. 2004) for the proposition that a defendant's "lies" to the police can constitute circumstantial evidence of guilt.[23] The facts of *Guevara* are incomparable with those of this case. In *Guevara,* the court held that the defendant "had a motive to kill his wife." *Id.* at 50. He was in a long-running affair with another woman which started three days before he married his wife, the victim of the murder. *Id.* Ultimately, his paramour gave him an ultimatum that unless he divorced the victim the affair would end. *Id.* He lied to the police by telling them he had a good relationship with his wife, denied the affair he was having

[23] *Guevara* cites as authority *Graham v. State,* 566 S.W.2d 941 (Tex. Crim. App. 1978) which holds that "[a]ttempts to conceal incriminating evidence and to elude officers can indicate knowledge of wrongful conduct." No such evidence was adduced in this case.

with his paramour (the "trigger man") and actually taught her how to use the same caliber pistol that was used to kill his wife. *Id.* at 50-51. He told another person that he was researching how to build a silencer, lied about having taken his wife to work on the day of her murder and, after his wife's murder, married his paramour three days after learning he would receive his wife's substantial retirement account. *Id.* Like the facts of *Temple,*[24] (and unlike the facts of this case) he showed little emotion upon learning of his wife's murder. *Id.*

CONCLUSION

The facts of each case are unique and must be independently evaluated in a searching inquiry in determining whether the burden of proof has been discharged beyond a reasonable doubt. *Nisbett, supra.* In assessing legal sufficiency, this Court must review evidence "using a magnifying glass that *incorporates* the reasonable-doubt burden of proof." *Redwine v. State,* 305 S.W.3d 360, 366 (Tex. App. Houston [14th Dist.] 2016); and "ensure that the evidence presented *actually* supports a conclusion that the defendant committed the crime charged." *Williams v. State,* 235 S.W.3d 742, 750 (Tex. Crim. App. 2007) (Emphasis added).

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[24]The facts of *Temple* are markedly different than those herein. Temple *conceded* he had a motive to kill his wife: a long-running affair with a woman whom he married after his wife's murder. *Id.* 355, 360. He showed little emotion after learning of her death; when asked if he wanted to find out who murdered his wife, he stated: "[W]hat difference does it make? It's not going to bring her back." *Id.* at 55. Before her death, he ridiculed her about her physical appearance. *Id.* at 43. On at least two occasions he told a witness to "keep your damn mouth shut", when he learned the witness was talking to the police and had gone to the grand jury. *Id.* Temple was also shown to be very familiar with the use of shotguns (the murder weapon). *Id.* 362.

In this case, the evidence was not "of such sufficient strength, character, and credibility to engender certainty beyond a reasonable doubt in the reasonable factfinder's mind..." *Brooks, supra,* at 917-918. It was "more speculative than inferential as to [Sandy's] guilt." *Winfrey v. State,* 393 S.W.3d 763, 771 (Tex. Crim. App. 2013); and "conclusions based on mere speculation or on factually unsupported inferences" were reached by the jury and the panel. Proof that amounts to a strong suspicion of guilt or a probability of guilt is legally insufficient. *Id.* at 769. The "rigorous" and "exacting standard" mandated by *Jackson v. Virginia's* legal sufficiency requirement was not met and this verdict may not be permitted to stand. Under the unique and specific facts of this case and the record herein, the evidence is legally insufficient.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, for the foregoing reasons, appellant respectfully prays that this Honorable Court reverse the conviction and enter a judgment of acquittal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's computer-generated Brief contains 7,494 words (relying on the word count of the computer program) and is in compliance with Rule 9.4(i)(2)(c) of the Texas Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief for Appellant has been delivered by email to Clinton Morgan, Assistant District Attorney, morgan_clinton@dao.hctx.net, on this 17th day of January, 2021.

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